

937 So.2d 686
District Court of Appeal of Florida,
Second District.

George Ernest MUNOZ, Appellant,
v.
STATE of Florida, Appellee.

July 28, 2006

Opinion

VILLANTI, Judge.

George Munoz appeals his judgment and sentence to fifteen years' prison for burglary of a dwelling, a second-degree felony. *See* § 810.02(3), Fla. Stat. (2004). He argues that the house under construction which he is accused of burglarizing cannot qualify as a dwelling and that his conviction should therefore be reduced to burglary of an unoccupied structure, a third-degree felony. *See* § 810.02(4)(a). We agree and reverse.

Ishmauel Dudley testified that he purchased the late nineteenth-century house burglarized by Munoz from its previous occupants to restore and resell. It was unoccupied at the time of the burglary. Dudley and his construction crew were reworking the house “from the ground up”-“adding two bedrooms, two bathrooms ... totally restoring [the] house” and adding a second-floor loft. They had removed a couple of the [i]nterior walls and all of the plaster in order to insulate the house. A back door was removed and replaced with a “piece of plywood.” And, at the time of the burglary, the phases of construction and inspections were incomplete. The pictures of the house entered into evidence show a house that had been gutted--no insulation or sheetrock, unfinished flooring, debris everywhere, stacks of plywood, exposed walls, and wires dangling from the ceiling. The pictures also show garbage, buckets, and work supplies on the floor. The house had a roof over it, a bathtub, a mini-refrigerator, a microwave, and miscellaneous items left behind by construction workers including clothes, tools, and tool boxes. The

house also had plumbing and electricity, but the power system was temporary and “for construction purposes” only and the indoor plumbing was not in use; the workers used the Port-O-Let prominently standing in the front yard.

It is undisputed that this house previously qualified as a dwelling under [section 810.011](#). [Section 810.011\(2\)](#) defines a “dwelling” as “a building or conveyance of any kind, including any attached porch, whether such building or conveyance is temporary or permanent, mobile or immobile, *which has a roof over it and is designed to be occupied by people lodging therein at night*, together with the curtilage thereof.” (emphasis added).

The house here had a roof over it, was designed to be occupied by people lodging therein at night, and in fact had been occupied for decades. The issue is whether it still qualifies as a dwelling even though it was undergoing massive reconstruction at the time of the burglary. . . . [T]his issue has apparently not been previously addressed in Florida.

In *State v. Bennett*, this court concluded that as long as a structure is “‘designed’ for eventual human habitation,” it qualifies as a dwelling. ([Fla. 2d DCA 1990](#)) (finding that a mobile home unconnected to utilities and sitting on a sales lot qualified as a dwelling under [section 810.011](#)). However, in *Perkins v. State* ([Fla. 1996](#)), the Florida Supreme Court suggested that a house designed for lodging by people but unsuitable for lodging may not qualify as a dwelling. In *Perkins*, the court noted that “the legislature has extended broad protection to buildings or conveyances of any kind that are designed for human habitation. Hence, an empty house in a neighborhood is extended the same protection as one presently occupied.” The court further stated:

“Occupancy is no longer a critical element under this [statutory] definition. Rather, it is the design of the structure or conveyance which becomes paramount. *If a structure or conveyance initially qualifies under this definition, and its character is not substantially changed or modified to the extent that it becomes unsuitable for lodging by people, it remains a dwelling irrespective of actual*

occupancy. It is, therefore, immaterial whether the owner of an unoccupied dwelling has any intent to return to it.” (emphasis added).

Thus, *Perkins* recognized that to qualify as a dwelling, the structure must not only be designed to be occupied by people for lodging therein at night, but also that it must not be substantially changed to the extent that it becomes unsuitable for lodging by people. . . . According to [section 810.011](#) and *Perkins*, if the character of the house is substantially changed to the extent that it becomes unsuitable for lodging . . . the house no longer qualifies as a dwelling.

The house owned by Dudley stands in stark contrast to the one discussed in *Perkins*, which was clearly suitable for lodging. See *Perkins* (discussing the house’s electricity, available well water, stove, refrigerator, washer, microwave, and assorted items in the closets and cabinets). Dudley’s house was missing interior walls, sheetrock, and insulation. It was undergoing a total restoration, and the inspections of it were not yet completed. The fact that the construction workers used a temporary power pole, a mini-fridge, and an old microwave, shown in the pictures surrounded by stacks of garbage, buckets, and work supplies, did not make this construction site suitable for lodging by any stretch of the imagination.

Applying *Perkins*, the house here no longer met the definition of a dwelling under the burglary statute. See *Perkins*, (concluding that a house that was unoccupied but suitable for lodging qualified as a dwelling) . . .

The evidence that Munoz entered the house under construction with intent to commit a theft was insufficient to sustain a conviction for burglary of a dwelling. As Munoz concedes, the evidence could have sustained a conviction for burglary of an unoccupied structure, see [§ 810.02\(4\)\(a\)](#), which was submitted to the jury as a lesser-included offense. Therefore, we reverse Munoz’s conviction and sentence for burglary of a dwelling and remand to the trial court with directions to enter a judgment of guilty of the lesser charge of burglary of an unoccupied structure and to resentence Munoz.

Reversed and remanded.

CANADY, Judge, Dissenting.

The majority correctly determines that the house which was burglarized by Munoz “had a roof over it, was *designed to be occupied by people lodging therein at night*, and in fact had been occupied for decades.” (emphasis added.) Despite this determination, the majority goes on to hold that because the renovation project had rendered the house “unsuitable for lodging,” the burglarized house was not a “dwelling” under chapter 810. The majority criticizes the analysis employed by this court in *Bennett* and rejects it in favor of a line of analysis the majority believes is “suggested” by the supreme court in *Perkins*. I dissent because I conclude that the rationale of *Bennett* should control the disposition of the instant case. For the reasons I will explain, I conclude that the majority has misread *Perkins*.

In *Bennett*, we considered whether a “mobile home which was located on a sales lot” and which “was fully furnished but unoccupied and not connected to utilities” could be considered a dwelling under chapter 810. We held that “in order to establish that the structure is a ‘dwelling’ within the purview of the burglary statute, we believe the state must introduce some evidence that it is actually to be used for habitation.” In reaching this conclusion, the *Bennett* court stated that “the plain meaning of the word ‘designed’ supports the state’s argument” that the statutory definition of “dwelling” is “broad enough to cover a mobile home on a sales lot, because it is ‘designed’ for *eventual* human habitation.”

The *Bennett* court thus focused on “the plain meaning of the word ‘designed’ ” in the statutory definition of dwelling. The court understood that the designed use of a structure denotes the purpose for which the structure is eventually intended to be used. The court’s analysis on this point is cogent. *Design* means “to plan or have in mind as a purpose” or “to devise or propose for a specific function.” *Webster’s Third New International Dictionary* 611 (1993).

Under the rationale employed in *Bennett*, the structure burglarized by Munoz in the instant case falls within the meaning of “dwelling” because the structure was “‘designed’ for eventual human habitation.” The structure falls within the statutory

definition because it undisputedly both (a) “has a roof over it” and (b) “is designed to be occupied by people lodging therein at night.” § 810.01(2). The designed use of the structure is not changed by transitory circumstances-such as a major renovation project-that render the premises temporarily uninhabitable.

A mobile home located on a sales lot and unconnected to utilities would not be suitable for current habitation. But under *Bennett*’s reading of the plain language of the statute, even though such a structure is temporarily unsuitable for habitation, it will be considered a “dwelling” if it is intended for “eventual human habitation.” The current habitability test utilized by the majority therefore is inconsistent with the plain language of the statute and cannot be reconciled with the rationale utilized by the *Bennett* court.

The majority apparently recognizes that its decision is in tension with the holding in *Bennett* but concludes that the supreme court’s decision in *Perkins* provides the appropriate basis for deciding this case. In my view, the majority’s understanding of *Perkins* is not supportable.

In *Perkins*, the court considered whether an unoccupied structure qualified as a dwelling under chapter 810. Recognizing that under the common law there was a “requirement that the house be occupied or that the owner intend to return,” the court concluded that the adoption of the statutory definition of “dwelling” had effected a change in the substance of the law. The court held that actual or intended occupancy was not necessary for a structure to be a dwelling under the statutory definition. . . . [T]he court explained the significance of the statutory definition:

“Occupancy is no longer a critical element under this [statutory] definition. Rather, it is the design of the structure or conveyance which becomes paramount. If a structure or conveyance initially qualifies under this definition, and its character is not substantially changed or modified to the extent that it becomes unsuitable for lodging by people, it remains a dwelling irrespective of actual occupancy. It is, therefore,

immaterial whether the owner of an unoccupied dwelling has any intent to return to it.”

From this statement, the majority in this case reasons that to maintain the status of a dwelling, a structure “must not be substantially changed to the extent that it becomes unsuitable for lodging by people.” The majority thus concludes that when a renovation project-such as the one involved in this case-is undertaken on a house, the house loses its status as a dwelling because the ongoing renovation project makes the house unsuitable for lodging.

In reaching this conclusion, the majority fails to give due weight to the importance the *Perkins* court assigns to the word “designed” in the statutory definition. *Perkins* makes clear beyond any doubt that in determining whether a structure is a dwelling, “it is the design of the structure” which is “paramount.” *Perkins* also acknowledges that the statute extends “broad protection to buildings ... of any kind that are designed for human habitation.” And the supreme court in *Perkins* specifically focuses on the fact that “the owner [of the structure] intended it be used” as a structure for lodging people at night.

In context, the reference in *Perkins* to the requirement that a structure’s “‘character ... not [be] substantially changed or modified to the extent that it becomes unsuitable for lodging,’ ” must be understood as a requirement that the use for which the structure is designed not be altered. What is in view is the possibility that a residential structure will be converted to a commercial or other nonresidential use. The change in “character” that the court envisions is a change in the designed purpose of the structure. Such a change in character does not include circumstances which may temporarily render a structure uninhabitable but which do not alter the purpose for which the structure is intended to be used. In the instant case, the character or the designed use of the structure remained unchanged even though the renovation project may have rendered the property temporarily unsuitable for habitation.

The tension which the majority apparently finds between *Bennett* and *Perkins* is illusory. As I mentioned earlier, the majority acknowledges that the

structure at issue here was “designed to be occupied by people lodging therein at night.” Given the text of the statutory definition, that characterization of the structure should be of crucial importance. But the majority brushes aside its own characterization of the design of the structure, overlooks the “paramount” importance that *Perkins* assigns to the “design of the structure,” and then deploys a test-current

habitability-that is inconsistent with the plain language of the statute and cannot be reconciled with the rationale of our decision in *Bennett*. . . .